

Message Text

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C O N F I D E N T I A L SECTION 01 OF 03 BONN 20427

E.O. 11652: GDS

TAGS: PGOV, PFOR, WB, GW, UR

SUBJECT: FRG-SOVIET LEGAL ASSISTANCE AGREEMENT

REF: USBERLIN'S 2557

SUMMARY: AS EMBASSY UNDERSTANDS FRG INTENTIONS, IDENTICAL FRG AND USSR STATEMENTS ON DIRECT COMMUNICATION OF LEGAL ASSISTANCE REQUESTS WOULD REPRESENT PARALLEL, IDENTICAL AND UNILATERAL STATEMENTS NOT INVOLVING LEGAL COMMITMENTS UNDER INTERNATIONAL LAW FROM EITHER ONE OF THE TWO STATES TO THE OTHER. THUS, FRG CONSIDERS PROPOSED ARRANGEMENT NOT TO CONSTITUTE TREATY, AGREEMENT OR ANY OTHER KIND OF ARRANGEMENT THAT WOULD BE GOVERNED BY INTERNATIONAL LAW OR FALL UNDER BKC/L (52)6. THE SOVIET UNION, ON THE OTHER HAND, APPARENTLY DOES LOOK UPON THE NEW ARRANGEMENT AS AN INTERNATIONAL AGREEMENT. THE GERMAN OBJECTIVE HAS BEEN TO REACH A COMPROMISE WHICH WOULD PERMIT A
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PRACTICAL SOLUTION TO A PROBLEM WITHOUT PREJUDIC-

ING THE LEGAL POSITION OF EITHER SIDE. THE QUESTION FOR THE ALLIES WILL BE WHETHER WE CAN LIVE WITH THE ARRANGEMENT REACHED WITHOUT PREJUDICING OUR OWN LEGAL POSITION. WE SUGGEST ONE POSSIBILITY FOR PRESERVING OUR POSITION WITHOUT INTERVENING IN THE NEGOTIATIONS THEMSELVES. END SUMMARY

1. EMBASSY IS GRATEFUL FOR VIEWS EXPRESSED BY USBER IN REFTEL, PARTICULARLY AS FIRST FIVE PARAGRAPHS OF REFTEL POINT UP THAT EMBASSY DESCRIPTION OF PROPOSED ARRANGEMENT WAS NOT ENTIRELY CLEAR. FRG REP WHO DISCUSSED THE PROPOSED US-FRG ARRANGEMENT IN THE BONN GROUP (FLEISCHHAUER) MADE VERY CLEAR THAT IN FRG VIEW THE STATEMENTS, WHILE IDENTICAL, WOULD IN ESSENCE BE UNILATERAL STATEMENTS OF INTENTION BY EACH SIDE MADE IN VIEW OF EXPECTATION OF IMPLEMENTATION OF SIMILAR INTENTION BY THE OTHER. FRG CONSIDERS SUCH ARRANGEMENT AS POSSIBLE WITHIN MEANING OF ARTICLE 9, PARAGRAPH 4, OF 1954 HAGUE CONVENTION.

2. IN RESPONSE TO SPECIFIC QUESTION FROM US REP AS TO WHETHER FRG CONSIDERED THAT ANY LEGAL OBLIGATION UNDER INTERNATIONAL LAW BY THE USSR TO FRG OR VICE VERSA WOULD ARISE BY REASON OF THESE STATEMENTS, FLEISCHHAUER INDICATED THAT IT DID NOT. HE SAID THAT IF USSR OR A POLITICAL SUB-DIVISION THEREOF WERE NOT TO ACCEPT REQUESTS FOR LEGAL ASSISTANCE SENT DIRECTLY BY FRG LAENDER OR WEST BERLIN JUSTICE AUTHORITIES, FRG WOULD, OF COURSE, HAVE THE OPTION UNILATERALLY TO DISCONTINUE THE ARRANGEMENT. IT WOULD NOT, HOWEVER, BE ABLE TO CLAIM THAT USSR HAD VIOLATED OBLIGATION UNDER THE TYPE OF TREATY OR AGREEMENT COVERED BY UN CONVENTION ON LAW OF TREATIES.

3. CLOSEST PARALLEL THAT COMES TO MIND IS ARRANGEMENTS BETWEEN US AND CANADIAN COMMUNITIES ALONG THE COMMON BORDER, POLITICAL SUB-DIVISIONS OF BOTH COUNTRIES BEING BARRED BY RESPECTIVE NATIONAL CONSTITUTIONS FROM ENTERING INTO AGREEMENTS WITH FOREIGN COUNTRIES OR SUB-DIVISIONS THEREOF WITHOUT FEDERAL GOVERNMENT APPROVAL. IF POPULATED AREA OR TOWN IS

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BISECTED BY BORDER, US AND CANADIAN PARTS UNILATERALLY ENACT LAWS OR PROMULGATE ORDINANCES EFFECTIVE ONLY WITHIN THEIR TERRITORY TO PROVIDE FOR SNOW CLEARANCE, RESCUE AND FIRE-FIGHTING SERVICES, SUPPLY OF WATER, ETC IN SPECIFIED COMMUNITY ACROSS THE BORDER. PROVISION OF SUCH SERVICES BY FACILITIES LOCATED ON ONE SIDE TO OTHER SIDE OF BORDER AS NEED ARISES AND SUBJECT TO SETTLEMENT OF FINANCIAL ASPECTS IS BASED ON

CONTINUED RECIPROCITY, EACH SIDE REMAINING LEGALLY
FREE TO DISCONTINUE SERVICES AT ANY TIME. IN THIS WAY,
NO LEGAL AGREEMENT OF KIND BARRED BY US OR CANADIAN
CONSTITUTION ARISES BUT SATISFACTORY COMMON USE OF
FACILITIES, AVOIDING UNNECESSARY DUPLICATION OF

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FACILITIES AND COSTS, WORKS TO SATISFACTION OF
COMMUNITIES ON BOTH SIDES.

4. HAVING SAID ALL OF THE ABOVE, WE SHOULD ADD THAT
WE OF COURSE CONTINUE TO AGREE WITH THE BASIC CONCERNS
EXPRESSED BY USBERLIN OVER SOVIET INTENTIONS IN THE
MATTER. THE SOVIETS APPARENTLY DO LOOK UPON THE
ARRANGEMENT AS AN INTERNATIONAL OBLIGATION OR AGREE-
MENT. MOREOVER, THE WORDING OF THEIR PROPOSED
UNILATERAL DECLARATION AND THEIR INTENDED NOTIFICATION
TO THE ALLIES SUGGESTS THAT THEY MAY CONSIDER IT NOT

AS A BILATERAL FRG-SOVIET AGREEMENT THAT IS BEING EXTENDED BUT AS A SEPARATE AGREEMENT CONCERNING BERLIN CONCLUDED WITH THE THREE WESTERN ALLIES ON A SUBJECT WHICH AFFECTS MATTERS OF STATUS.

5. WE AGREE THAT ANY OF THE SUGGESTIONS MADE BY USBERLIN (PARAS 6 AND 7, REFTEL) WOULD BE AN IMPROVE-CONFIDENTIAL

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MENT OVER THE PRESENT SITUATION. GIVEN THE LONG NEGOTIATING HISTORY, HOWEVER, WE ARE SKEPTICAL OF OUR ABILITY TO INFLUENCE THE OUTCOME. CURRENT EXPERIENCE WITH THE INNER-GERMAN TRANSIT NEGOTIATIONS SUGGESTS THAT ONCE THE FRG OBTAINS AN AGREEMENT WITH WHICH IT IS SATISFIED, THE ALLIES WILL COME UNDER GREAT PRESSURE TO CONCUR.

6. IT MAY BE HELPFUL IN REACHING OUR OWN POSITION TO BACK AWAY FROM THE FORM FOR A MOMENT AND LOOK AT THE SUBSTANCE. IT IS PERHAPS MISLEADING TO TREAT WHAT WE HAVE ERRONEOUSLY BEEN CALLING A "LEGAL ASSISTANCE AGREEMENT" AS COMPARABLE TO THE PROPOSED CULTURAL AND SCIENTIFIC-TECHNOLOGICAL AGREEMENTS. THOSE TOO ARE STALLED OVER THE BERLIN PROBLEM, BUT IN THOSE THE ISSUE IS HOW TO INCLUDE BERLIN IN A BROADER BILATERAL AGREEMENT. THE RECENT BRIEFINGS BY THE FRG SUGGEST, ON THE OTHER HAND, THAT THE ONLY REASON FOR EMBARKING ON THE LEGAL ASSISTANCE NEGOTIATIONS WAS TO FIND A WAY TO HANDLE LEGAL ASSISTANCE REQUESTS RELATED TO BERLIN. IN EFFECT, WHAT THE FRG IS STRIVING FOR IS AN ARRANGEMENT CONCERNING BERLIN; IN ORDER TO ACHIEVE SUCH AN ARRANGEMENT, IT IS WILLING TO CHANGE PROCEDURES FOR THE FRG AS WELL.

7. WHETHER OR NOT THERE IS A PRACTICAL NEED FOR THE ARRANGEMENT IS NOT A MATTER ON WHICH ALLIED OPINIONS HAVE BEEN REQUESTED. THE GERMANS APPARENTLY BELIEVE THERE IS SUCH A NEED, AND THEY REFER TO THE LARGE NUMBER OF PENDING LEGAL ASSISTANCE MATTERS WITH POLAND AND CZECHOSLOVAKIA, WHOSE HANDS ARE TIED UNTIL AN ARRANGEMENT IS WORKED OUT WITH THE SOVIET UNION. FOR BETTER OR WORSE, THE FRG IS COMMITTED TO REACHING AGREEMENT IF AT ALL POSSIBLE.

8. IN SUBSTANCE, THE NEGOTIATIONS CONCERN A PRACTICAL PROBLEM RELATING TO BERLIN, WITH THE IMPACT ON THE LAENDER OF THE FRG -- FOR WHOM NO SUCH ARRANGEMENT WOULD HAVE BEEN NECESSARY -- BEING ALMOST INCIDENTAL. IN THE NEGOTIATIONS THE SOVIETS SEEM CLEARLY TO HAVE ACCEPTED THE RIGHT OF THE FRG TO REPRESENT BERLIN.

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TO THIS EXTENT, THEN, NEITHER THE GERMAN NOR THE ALLIED
LEGAL POSITION IS AFFECTED. THE DANGER, IF ANY, WILL
BE IN THE WAY THE RECORD IS LEFT ONCE THE NEGOTIATIONS
ARE CONCLUDED.

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9. WE ARE SYMPATHETIC WITH THE GERMAN POSITION
THAT IN ORDER TO MAKE PROGRESS IN RESOLVING
PRACTICAL PROBLEMS IT IS NECESSARY TO MAKE COMPROMISES,
SO LONG AS THESE COMPROMISES CAN BE WORKED OUT IN SUCH A WAY AS NOT TO AFFECT THE LEGAL POSITION

OF EITHER SIDE. WHAT IS NEEDED IS AN ALLIED POSITION
-- PROBABLY ALSO A COMPROMISE -- WHICH WILL LEAVE OUR
BASIC RIGHTS UNAFFECTED AS WELL.

10. ONE POSSIBILITY FOR ACHIEVING SUCH A RESULT
WOULD BE ISSUANCE OF A BK/O SETTING FORTH OUR VIEW OF
THE SITUATION. SUCH A BK/O MIGHT REFER TO THE EXCHANGE
OF VIEWS BETWEEN THE FRG AND THE SOVIET UNION OVER THE
HANDLING OF LEGAL ASSISTANCE REQUESTS TO AND FROM THE
AUTHORITIES OF WEST BERLIN, NOTE THAT THE ARRANGEMENT
FOR PARALLEL INTERNAL PROCEDURES IS CONSISTENT WITH
THE PROVISIONS OF ARTICLE 9 OF THE HAGUE CONVENTION
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PERMITTING DIRECT EXCHANGE OF DOCUMENTS BETWEEN
AUTHORITIES, AND EXPRESS APPROVAL OF THE PROCEDURES
INTRODUCED BY THE SENAT TO CARRY OUT THE ARRANGEMENT.
ARMED WITH SUCH A BKL/O, WE WOULD BE EQUIPPED
TO TELL THE SOVIETS, IF WE RECEIVE NOTIFICATION
FROM THEM, THAT SUCH NOTIFICATION IS IRRELEVANT.

11. WE PLAN TO FLOAT SUCH AN IDEA IN THE NEXT ROUND
OF TRIPARTITE DISCUSSIONS AND WOULD MEANWHILE WELCOME
USBER'S COMMENTS.
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